Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

SECOND ROUND REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby submits these reply comments on the "Access to Rights-of-Way" issues in the Commission's Notice of Proposed Rulemaking ("Interconnection NPRM") released April 19, 1996, in the above proceeding (¶¶ 220-225).[1]

I. ACCESS TO RIGHTS-OF-WAY -- ¶¶ 220-225

The Interconnection NPRM correctly focuses on the fact that Section 703 of the Telecommunications Act of 1996 fundamentally changes the pre-existing pole attachment requirements of Section 224 of the Act. Prior to the 1996 Act, there was no requirement -- aside from the obligations that may exist under the antitrust laws -- that pole owners make space available to other parties. Instead, old Section 224 simply required that access be "just and reasonable" if access were made available.

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[1] ALTS is the national trade association of over thirty facilities-based competitive providers of access and local exchange services.

New Section 224 now requires that access be made available by local exchange companies (including new entrants), and utilities to all requesting telecommunications carriers. Furthermore, such access must be "nondiscriminatory," a requirement not found in old Section 224. The Interconnection NPRM correctly concludes that these changes are significant enough to require that rules implementing Section 251(b)(4)'s right-of-way requirement, which necessarily must incorporate the changes made to Section 224, be included in the Commission's Section 251 regulations (¶ 221).

But the logic of the Interconnection NPRM is unpersuasive to some commentors. SWB insists that: "It appears to be inconsistent with the 1996 Act for the Commission to adopt detailed rules to address a variety of fact-specific issues that may or may not arise under the expanded provisions of the Pole Attachment Act .... Given the success of [the Pole Attachment Act complaint] process under the pre-1996 Pole Attachment Act, there is no reason to believe that the same complaint procedures will not be adequate ..." (SWB Second Round Comments at 14).[2] SWB contends that: "utilities' existing policies and procedures should be allowed to continue to function as they have for a number of years in allowing access to right-of-way structures;"

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[2] See also US WEST Second Round Comments at 13: "any attempt by the Commission to articulate and implement detailed national standards on use of poles, conduits, and right-of-way would be futile."

(SWB Reply Comments at 16).

But if SWB is correct that "existing policies and procedures" are working so well, why did Congress adopt such profound changes in the 1996 Act, including the "nondiscriminatory" requirement? SWB is simply trying to read these new provisions out of the Act. SWB goes on to demand that if the Commission does adopt rules, it should require that any telecommunications carrier seeking access to right-of-way:

- "must have any certificate of authority required to provide its communication service;"
- "must obtain any authorization required by the proper governmental source"
- "must secure an easement from the current owner of the property"[3] (SWB Second Round Comments at 18, n. 23).

SWB's litany of "preconditions" is plainly inappropriate. Existing facilities already have authorization from the proper governmental and private authorities. If there are any incremental legal issues created by the requested use of the facility by an additional entity, that issue should be settled by the requesting entity with those authorities or private parties,

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[3] US WEST makes a similar contention (US WEST Second Round Comments at 15): "a controlling LEC cannot grant what it does not have .... Some private easements and virtually all public easements are restricted to a given carrier;" emphasis in original. Obviously, the burden should fall on the carrier making such a claim to prove that unused capacity on an existing easement cannot be supplied to requesting telecommunications carriers as required by Congress in new Section 224 without permission from existing easement grantor or public authorities.

not by SWB as the self-appointed enforcer of law and order in the world of right-of-way.[4]

The heart of the debate over new Section 224(f) centers on the statutory caveat that utilities need not provide access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes;" Section 224(f)(2). Comments by several interested parties underscore the need for regulations on this point.

The Second Round Joint Comments of the UTC and the Edison Institute are unambiguous in rejecting the notion of any "rules" governing the "insufficient capacity" exception (at 8): "There are no specific standards which could be used to determine in advance for all facility owners when there is 'insufficient capacity' to permit access." Duquesne Light Company proclaims that: "The amount of such reserve should not be determined as an absolute limit (e.g., 30%), because the need for such reserve will vary depending upon the situation;" (Second Round Comments at 17).[5]

The Commission should reject these pleas for unfettered "capacity" reserves. Instead, utilities should be entitled to

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[4] In particular, SWB fails to explain how SWB would ever be injured in the highly unlikely event that a requesting carrier were to obtain access without the proper legal authority.

[5] Compare US WEST's suggestion that 15% is the normal "reserve" capacity limit for conduit which, when exceeded, triggers the need for a "growth" construction job (Second Round Comments at 16).

only those reserve requirements that are documented in industry capacity planning practices, or approved by state commissions.[6]

The same considerations also apply to safety and reliability. The electric utilities are quite correct that different safety practices apply in high-voltage environments, and telecommunications carriers have no desire to compromise those requirements (Joint Second Round Comments of UTC and Edison Institute at 8). However, because the safety requirements for electric utility facilities are so important, they are also well understood and documented. The Commission's rules need only require that any attempt to invoke the "safety" caveat of new Section 224(f) must reflect documented industry safety practices.

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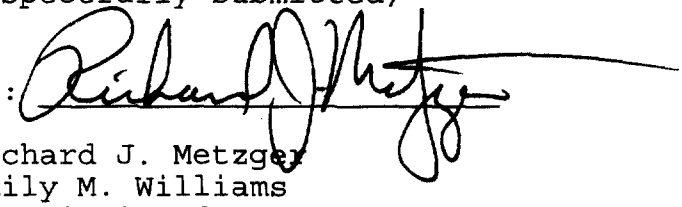
[6] ALTS understands that several states have well-defined limits on the amount of unused capacity that can be claimed as "used and useful" by a utility (sometimes defined by the amount of time that can lapse before the spare capacity becomes needed), and thus included in its rate base. Obviously, at a minimum, a utility should not be allowed to hang on to capacity it is not allowed to treat as used and useful.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission adopt rules implementing Section 251(b)(4) and Section 224 in the manner described above.

Respectfully submitted,

By: 

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
1200 19th Street, N.W., Suite 560
Washington, D.C. 20036
(202) 466-3046

June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Second Round Reply Comments of the Association for Local Telecommunications Services was served June 3, 1996, on the following persons by First-Class Mail or by hand service, as indicated.

M. Louise Banzon

Regina Keeney*
Chief, Common Carrier Bureau
FCC, Room 500
1919 M Street, N.W.
Washington, D.C 20554

A. Richard Metzger *
Deptuy Bureau Chief
Common Carrier Bureau
FCC, Room 500
1919 M Street, N.W.
Washington, D.C. 20554

Larry Atlas*
Associate Bureau Chief
Common Carrier Bureau
FCC, Room 500
1919 M Street, N.W.
Washington, D.C. 20554

ITS*
2100 M Street, N.W.
Washington, D.C. 20554

* hand delivery

Donald J. Russell
Chief
Telecom. Task Force
Department of Justice
Antitrust Division
555 4th Street, Room 8104
Washington, D.C. 20001

Andrew S. Joskow
Chief
Economic Regulatory Section
U.S.Department of Justice
Antitrust Division
555 4th Street, Room 8104
Washington, D.C. 20001

BELL ATLANTIC NYNEX MOBILE, INC.
John T. Scott, III
CROWELL & MORING
1001 Pennsylvania Ave.,N.W.
Washington, D.C. 20004

Betsy Brady
AT & T
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036

Mary Brown
Director, Federal Regulation
MCI
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Andy Lipman
SWIDLER & BERLIN, CHTD.
Attorneys for
MFS Communications
3000 K Street, N.W.
Suite 300
Washington, D. C. 20007

Saul Fisher
William J. Balcerski
NYNEX
1111 Westchester Avenue
White Plains, NY 10604

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
SPRINT
1850 M Street, N.W.
11th Floor
Washington, D.C. 20036

Maureen O. Helmer
General Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223

Johnathan M. Chambers
Vice President of Public
Affairs
Sprint Spectrum, L.P.
1801 K Street, N.W., Suite
M-112
Washington, D.C. 20036

Lydia Pulley
James G. Pachulski
Attorneys for Bell Atlantic
1320 North Court House Road
8th Floor
Arlington, VA 22201

Robert B. McKenna
Kathryn Marie Krause
Attorneys for US WEST, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Robert M. Berger
Joseph M. Sandri, Jr.
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036

Linda L. Oliver
Kyle Dixon
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Counsel for LDDS WorldCom

Charles H. Kennedy
MORRISON & FOERSTER, LLP
2000 Pennsylvania Ave., N.W.
Suite 5500
Washington, D.C. 20006

MARGARET E. GARBER
Pacific Telesis Group
1275 Pennsylvania Ave.,N.W.
Washington, D.C. 20004

Linda G. Morrison
Antoinette Cook Bush
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Attorneys for Ameritech

Kelly R. Welsh
Mike Pabian
Ameritech
30 South Wacker Drive
Chicago, IL 60606

Genevieve Morelli
Competitive Telecomm.
Association
1140 Connecticut Ave., N.W.
Suite 220
Washington, D.C. 20036

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
N A R U C
1102 ICC Building
P.O. Box 684
Washington, D.C. 20044

Gail Garfield Schwartz
VP Public Policy & Govt Aff.
TCG
2 Teleport Drive
Staten Island, NY 10311-1004

M. Robert Sutherland
Richard M. Sbaratta
A. Kirven Gilbert III
BellSouth Corporation
1155 Peachtree St., NE
Suite 1700
Atlanta, GA 30309-3610

Keith Townsend
United States Telephone
Association
1401 H St., N.W.
Suite 6700
Washington, D.C. 20005